

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SCOTT MARQUETTE,

CASE NO. 13cv2719-WQH (JMA)

Plaintiff.

VS.

BANK OF AMERICA, N.A., f/k/a
Countrywide Home Loans, Inc., an
entity of unknown form; FEDERAL
HOME LOAN MORTGAGE
CORPORATION S/A-3 DAY ARC-
125949, an entity of unknown form;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
Delaware Corporation; and DOES 1-
10, inclusive.

Defendants

HAYES, Judge:

The matter before the Court is the Motion for Leave to Amend the Complaint filed by Plaintiff Scott Marquette. (ECF No. 14).

I. Background

On November 12, 2013, Plaintiff Scott Marquette initiated this action by filing a Complaint in this Court. (ECF No. 1). On March 3, 2014, Defendants Bank of America, N.A. (“Bank of America”), Federal Home Loan Mortgage Corporation S/A-3 day ARC-125949 (“Freddie Mac”), and Mortgage Electronic Registration Systems, Inc. (“MERS”) filed a motion to dismiss the Complaint. (ECF No. 9). On July 30, 2014, the Court granted the motion and dismissed the Complaint without prejudice. (ECF No.

1 13). The Court granted Plaintiff thirty days to file a motion for leave to amend the
2 complaint.

3 On August 29, 2014, Plaintiff filed the Motion for Leave to Amend the
4 Complaint. (ECF No. 14). On September 29, 2014, Defendants filed an opposition.
5 (ECF No. 15).

6 **II. Contentions of the Parties**

7 Plaintiff contends that Defendants will suffer no prejudice from amendment
8 because this action is in the early stages of litigation, discovery has not commenced, and
9 the proposed first amended complaint contains no new causes of action. Plaintiff
10 contends that the motion is brought within the time ordered by the Court. Finally,
11 Plaintiff contends that amendment would not be futile because the proposed first
12 amended complaint alleges additional facts that address the pleading deficiencies
13 identified in the Court's July 30, 2014 Order.

14 Defendants contend that they will suffer prejudice if amendment is granted
15 because the proposed first amended complaint is based on "identical allegations that
16 cannot support any valid cause of action" and would require Defendants to "be forced
17 to file yet another motion to dismiss." (ECF No. 15 at 26). Defendant argues that there
18 was undue delay in filing the present motion because the proposed first amended
19 complaint does not contain any additional material allegations. Finally, Defendant
20 contends that amendment would be futile because the single additional factual
21 allegation in the proposed first amended complaint does not cure Plaintiff's previous
22 failure to state a claim.

23 **III. Discussion**

24 Federal Rule of Civil Procedure 15 mandates that leave to amend "be freely given
25 when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with
26 extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
27 Cir. 2003) (quotation omitted). In determining whether to allow an amendment, a court
28 considers whether there is "undue delay," "bad faith," "undue prejudice to the opposing

1 party,” or “futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “Not
 2 all of the [Foman] factors merit equal weight.... [I]t is the consideration of prejudice
 3 to the opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at
 4 1052 (citation omitted). “The party opposing amendment bears the burden of showing
 5 prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).
 6 “Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there
 7 exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Eminence*
 8 *Capital*, 316 F.3d at 1052.

9 After review of the motion, the proposed first amended complaint, and the filings
 10 of the parties, the Court concludes that Defendants have not made a sufficiently strong
 11 showing of the *Foman* factors to overcome the presumption under Rule 15(a) in favor
 12 of granting leave to amend. *See Eminence Capital*, 316 F.3d at 1052. Plaintiff did not
 13 unduly delay bringing the present motion. The Court’s July 30, 2014 Order stated that
 14 Plaintiff had thirty days to file a motion for leave to amend; Plaintiff did so twenty-nine
 15 days later on August 29, 2014. At this stage of the proceedings, Defendant would not
 16 be prejudiced if Plaintiff were given a second chance to state a claim. The Court will
 17 defer consideration of any challenge to the merits of the proposed first amended
 18 complaint until after the amended pleading is filed. *See Netbula v. Distinct Corp.*, 212
 19 F.R.D. 534, 539 (N.D. Cal. 2003) (“Ordinarily, courts will defer consideration of the
 20 challenges to the merits of a proposed amended pleading until after leave to amend is
 21 granted and the amended pleading is filed.”).

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1 || IV. Conclusion

IT IS HEREBY ORDERED that the Motion for Leave to Amend the Complaint is GRANTED. (ECF No. 14). Plaintiff shall file the First Amended Complaint, as set forth in Exhibit A of the Motion for Leave to Amend the Complaint (ECF No. 14-1 at 12-43), with **ten (10)** days from the date this Order is filed. Defendants shall respond to the First Amended Complaint within **fourteen (14)** days from the date the First Amended Complaint is re-filed. Fed. R. Civ. P. 15(a)(3).

8 | DATED: October 3, 2014

William Q. Hayes
WILLIAM Q. HAYES
United States District Judge